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August 14, 2018

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive
Columbia, South Carolina 29210

**RE: Friends of the Earth and Sierra Club, Complainant/Petitioner v.
South Carolina Electric & Gas Company, Defendant/Respondent
Docket No. 2017-207-E**

**Request of the Office of Regulatory Staff for Rate Relief to South
Carolina Electric & Gas Company's Rates Pursuant to S.C. Code
Ann. § 58-27-920
Docket No. 2017-305-E**

**Joint Application and Petition of South Carolina Electric & Gas
Company and Dominion Energy, Incorporated for Review and
Approval of a Proposed Business Combination between SCANA
Corporation and Dominion Energy, Incorporated, as May Be
Required, and for a Prudency Determination Regarding the
Abandonment of the V.C. Summer Units 2 & 3 Project and
Associated Customer Benefits and Cost Recovery Plans
Docket No. 2017-370-E**

Dear Ms. Boyd:

Enclosed for filing on behalf of South Carolina Electric & Gas Company ("SCE&G") in the above-referenced dockets is SCE&G's Response to Motion to Sanction Joint Applicants and to Compel Production of Wrongfully Withheld Documents in Joint Applicants' Privilege Log. Also enclosed for filing in the above-referenced dockets is SCE&G's Motion for Leave to File Documents Under Seal.

By copy of this letter and per the electronic service agreement in the above-captioned documents, we are providing the other parties of record with a copy of the enclosed documents and attach a certificate of service to that effect.

(Continued ...)

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If you have any questions, please advise.

Very truly yours,


K. Chad Burgess

KCB/kms
Enclosures

cc: All Parties of Record in Docket No. 2017-370-E
All Parties of Record in Docket No. 2017-305-E
All Parties of Record in Docket No. 2017-207-E
(all via electronic mail w/enclosure)

**THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA**

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE: Friends of the Earth and Sierra Club,)
Complainant/Petitioner vs. South Carolina)
Electric & Gas Company,)
Defendant/Respondent)
)

IN RE: Request of the South Carolina Office of)
Regulatory Staff for Rate Relief to SCE&G)
Rates Pursuant to S.C. Code Ann. § 58-27-)
920)
)

**RESPONSE TO MOTION
TO SANCTION JOINT
APPLICANTS AND TO
COMPEL PRODUCTION
OF WRONGFULLY
WITHHELD DOCUMENTS
IN JOINT APPLICANTS'
PRIVILEGE LOG**

IN RE: Joint Application and Petition of South)
Carolina Electric & Gas Company and)
Dominion Energy, Incorporated for Review)
and Approval of a Proposed Business)
Combination between SCANA Corporation)
and Dominion Energy, Incorporated, as May)
Be Required, and for a Prudency)
Determination Regarding the Abandonment)
of the V.C. Summer Units 2 & 3 Project)
and Associated Customer Benefits and Cost)
Recovery Plans)

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South Carolina Electric & Gas Company ("SCE&G" or "Company") hereby responds to the August 8, 2018 motion by the South Carolina Office of Regulatory Staff ("ORS") for sanctions and to compel the production of documents withheld in SCE&G's privilege log.

INTRODUCTION

ORS alleges that SCE&G should be sanctioned because it failed to comply with the Hearing Officer's Order No. 2018-73-H (the "Order"), which ordered the production of documents responsive to certain requests relating to the Bechtel Corporation ("Bechtel"). These allegations are indeed serious, and SCE&G appreciates the opportunity provided to it, on an expedited basis, to correct the record as it relates to these allegations. SCE&G has fully complied with the Order, and ORS's request for sanctions should be denied in its entirety.

ORS seeks sanctions here because it contends that SCE&G has withheld information, on the basis of the attorney-client privilege and the work product doctrine, that the Hearing Officer required it to produce. That is simply inaccurate. The Hearing Officer's June 21, 2018 directive ordered SCE&G to produce only the documents that SCE&G had indicated it was prepared to produce, and SCE&G has fully complied with this directive. To the extent that ORS believes SCE&G should not have been allowed to withhold any such documents as privileged, ORS's contention is belied by the very order ORS claims SCE&G violated. The Hearing Officer expressly recognized that SCE&G would provide a privilege log to address any documents withheld on the basis of privilege. Order at 2. Considering the Hearing Officer's explicit recognition and approval of SCE&G's intention to provide a privilege log describing certain Bechtel-related documents in response to ORS Requests Nos. 2-5, 6-6, 6-7, 6-8 and 6-9 (the "ORS Bechtel Requests"), ORS cannot credibly claim that SCE&G has failed to comply with the Order because it provided this "previously promised privilege log." SCE&G did exactly what it said it would do, and exactly what the Hearing Officer ordered.

Specifically, as described in more detail below, SCE&G stated in its June 11, 2018 response to ORS's May 23, 2018 motion to compel that SCE&G would produce certain Bechtel-related documents in response to the ORS Bechtel Requests, which rendered ORS's motion to compel as to those requests moot. *See* Joint Applicants' Response to Mot. to Compel Disc. Responses (June 11, 2018) at 6. SCE&G also expressly stated that SCE&G was not waiving the attorney-client privilege for communications that concern any other aspects of the Project or other issues before the Commission, "nor d[id] it waive attorney-client privilege or work product protection for documents related to Bechtel that SCE&G may have an independent basis for withholding based on a claim of privilege." *Id.* at 5, n. 5 The Commission ordered SCE&G to produce "the responsive documents," meaning those that SCE&G indicated it would produce, and noted that the production would be accompanied by "the previously promised privilege log" on or before July 6, 2018. Order at 2.

SCE&G did exactly what it agreed to do and what it was ordered to do. It produced, on July 6, 2018, non-privileged documents it possessed responsive to the ORS Bechtel Requests. Consistent with both SCE&G's statement in its June 11, 2018 response noting that it intended to claim privilege as to certain additional documents responsive to the ORS Bechtel Requests and the Order, SCE&G also produced a privilege log that listed 62 privileged documents. There is nothing inappropriate, let alone sanctionable, about logging documents as privileged in accordance with the explicit directive in the Order.

In any event, as SCE&G indicated to ORS the week prior to ORS filing this motion,¹ at the time of the conversation, SCE&G was re-evaluating whether to continue to assert privilege

¹ ORS made no mention of these discussions in its request for sanctions. That SCE&G was already engaged with ORS to address the very issues about which ORS now complains makes clear that SCE&G did not engage in misconduct justifying sanctions. Had ORS simply

over documents that appeared on this log. SCE&G has now completed this process, and on August 10, 2018, produced four additional Bechtel-related documents responsive to ORS Request No. 6-7 and served a revised privilege log, listing 57 Bechtel-related documents.² Those 57 documents fall into the following two categories: (1) privileged communications generated after the Owners' August 2017 petition to abandon the Project concerning whether to release the Bechtel Report in response to requests from the South Carolina state government; and (2) privileged documents that are responsive to Request 6-6, solely because they are documents in which the terms "Kevin Marsh" and "Bechtel," or "Kevin Marsh" and "Project Manager" appear, but have no connection to the Bechtel Report. These privileged documents are within the specific categories of documents for which SCE&G expressly noted it was preserving its privilege claims and have been properly included and fully described in SCE&G's privilege log. There is no basis to even compel production of these documents, let alone to sanction SCE&G.

ORS also has moved to compel the production of SCE&G's privileged and work product documents relating to 2017 analyses of whether to continue construction of V.C. Summer Units 2 and 3 (the "Project") following the bankruptcy of its contractor, Westinghouse Electric Company LLC ("Westinghouse"). ORS's motion to compel these documents similarly lacks merit. The studies and analyses performed by SCE&G after Westinghouse's bankruptcy were done at the direction of counsel and to assist in counsel's ability to advise the Company in connection with proceedings under the Base Load Review Act ("BLRA"). This falls squarely within attorney-client privilege and work product protection, which SCE&G properly asserted in

provided SCE&G with the 10 days it requested to respond to ORS's demand that SCE&G produce various additional documents listed on the privilege log, as SCE&G has now done, the dispute likely would have been moot. However, in its haste to disparage SCE&G, ORS rushed to file the instant motion and refused SCE&G's request for additional time.

² SCE&G had also produced a fifth document from its original July 6, 2018 privilege log to ORS before August 10, 2018.

its privilege log relating to ORS Request No. 5-26. ORS's arguments to the contrary rely on a cramped interpretation of attorney-client privilege and work product under which communications between non-attorneys or documents that serve a dual legal-business purpose can never qualify for protection. That is not the law. Nonetheless, in an effort to accommodate ORS and avoid an unnecessary dispute over discovery, SCE&G has re-evaluated each of the documents referenced on the privilege log relating to Request No. 5-26 and has determined that certain of these documents can be produced as non-privileged. Accordingly, SCE&G will make a supplemental production containing these de-designated documents, as well as provide an updated privilege log to ORS reflecting the remaining withheld documents responsive to Request No. 5-26.

BACKGROUND

I. The Bechtel Documents

The Bechtel documents relate to a 2015 assessment of the Project performed by Bechtel Corporation. As SCE&G has consistently noted, SCE&G's and Santee Cooper's legal counsel engaged Bechtel amidst escalating tensions with Westinghouse and Chicago Bridge and Iron ("CB&I") to assist with providing legal advice regarding possible litigation arising from the Project. Bechtel thus worked as a non-testifying, consulting expert to assist with threatened litigation.

ORS served five requests on SCE&G related to the Bechtel Report, defined above as the ORS Bechtel Requests. Despite ORS's generic claim to the contrary, these requests are quite narrow:

- **Request 2-5:** Provide meeting notes from the October 22, 2015 briefing by Bechtel to the leadership of Santee Cooper and SCANA.
- **Request 6-6:** Provide all documents, including emails, regarding the NND Project from the period April 1 through November 30, 2015 containing the words,

“Kevin Marsh” and “Bechtel.” Please conduct a search for the same time period for documents containing the words, “Kevin Marsh” and “project manager.”

- **Request 6-7:** Provide all correspondence and documents, including emails, that concern the removal of the projected completion dates in the draft version of the Bechtel report dated Nov. 9, 2015, from the final version published in February 2016.
- **Request 6-8:** Provide all documents, including emails, that discuss the hiring of attorney George Wenick as it related to the Bechtel corporation and the report it produced.
- **Request 6-9:** Provide all documentation discussing release of the Bechtel report.

SCE&G initially did not produce documents responsive to these requests, citing attorney-client privilege and work product protection. ORS sent a letter to SCE&G on May 9, 2018 regarding the Bechtel documents and other discovery issues, to which SCE&G provided a detailed response on May 16, 2018. ORS then moved to compel on May 23, 2018.

SCE&G responded to ORS’s motion to compel on June 11, 2018. In response to ORS’s motion—and the many misleading assertions it made about the nature of the Bechtel Report—SCE&G stated that it “ha[d] decided to produce documents that provide the full account of the Bechtel engagement and assessment, including the communications related to the engagement of Bechtel and the ensuing Bechtel Report (collectively, the ‘Bechtel Materials’).” Joint Applicants’ Resp. to ORS Mot to Compel Disc. at 5. SCE&G expressly noted, however, that it did “not waive attorney-client privilege for communications that concern any other aspects of the Project or other issues before the Commission, nor d[id] it waive attorney-client privilege or work-product protection for documents related to Bechtel that SCE&G may have an independent basis for withholding based on a claim of privilege.” *Id.*

On June 21, 2018, the Hearing Officer granted in part and denied in part ORS’s motion to compel. With respect to the Bechtel Materials, the Hearing Officer noted that SCE&G had stated “that SCE&G w[ould] produce these materials sought by ORS.” Order at 2. The Hearing

Officer thus ordered that SCE&G produce these promised materials *and a privilege log* identifying any additional materials as to which SCE&G continued to assert a claim of privilege, by July 6, 2018. *Id.* SCE&G complied with this Order. SCE&G had already attached many of the documents responsive to the ORS Bechtel Requests to its response to the motion to compel. On July 6, 2018, SCE&G made an additional document production responsive to the ORS Bechtel Requests, as well as the privilege log referenced in the Order.

On July 17, 2018, ORS sent a letter to SCE&G disagreeing with SCE&G's privilege determinations regarding the ORS Bechtel Requests. *See* ORS Mot., Ex. C (July 17, 2018 Letter to K. Chad Burgess) at 4–5. On July 20, 2018, SCE&G responded that it was “actively involved in reviewing Bechtel-related documents to determine what material may be disclosed,” but needed additional time given the large scope of documents. *See* ORS Mot., Ex. D (July 20, 2018 Letter to M. Richardson). On August 2, 2018, counsel for SCE&G held a call with ORS, during which SCE&G counsel informed ORS that SCE&G was continuing to evaluate its privilege determinations and expected to produce additional documents within 10 to 14 days.

On August 10, 2018, SCE&G further produced four additional Bechtel documents responsive to ORS Request No. 6-7 that it had previously marked as privileged, and served a revised privilege log that listed 57 documents responsive to the ORS Bechtel Requests.³ As explained in greater detail below, all of these 57 documents are privileged on an independent basis and thus are expressly excluded from SCE&G's agreement in the June 11, 2018 response to ORS's motion to compel to produce documents responsive to the ORS Bechtel Requests.

³ These four documents were in addition to three other documents responsive to Request 6-6 that SCE&G produced (two with redactions) after evaluating its initial privilege determination.

II. Request 5-26

Following the announcement that Westinghouse would file for bankruptcy in March 2017, SCE&G began an independent analysis of the Project, based on the information then available to SCE&G. This analysis was done at the direction of SCE&G's outside counsel, and it was completed to facilitate legal advice related to proceedings before the Commission under the BLRA.

ORS's Request 5-26 seeks documents related to these studies. Specifically, Request 5-26 "seeks information related to analyses and case studies prior to the decision to abandon the NND Project," and requests "analyses and case studies showing" five specific scenarios of how the Project may or may not have been completed. SCE&G responded that it would provide non-privileged documents, but also objected that the Request called for information protected by the attorney-client privilege. On July 6, 2018, SCE&G produced documents responsive to Request 5-26, and listed responsive documents withheld on the basis of attorney-client privilege or work product protection on its privilege log.

In its July 17, 2018 letter, ORS objected to the inclusion of documents responsive to Request 5-26 on SCE&G's privilege log. ORS took the position that, because the decision to abandon the Project involved business considerations, no documents related to that decision could be subject to attorney-client privilege. *See* ORS Mot., Ex. C (July 17, 2018 Letter to K. Chad Burgess) at 4-5. ORS further argued that SCE&G had waived its privilege with respect to Request 5-26 by producing non-privileged documents responsive to that Request to an ORS consultant, Norm Richardson. *Id.* at 5.

In a response letter dated July 20, 2018, SCE&G explained that many of the documents sought by Request 5-26 were created by SCE&G employees acting at the direction of counsel to assist with legal advice related to Westinghouse's bankruptcy and anticipated regulatory

proceedings, and were therefore privileged or protected work product. *See* ORS Mot., Ex. D (July 20, 2018 Letter to ML Richardson) at 3–4. On August 10, 2018, SCE&G produced its revised privilege log, which contained 406 entries related to Request 5-26. A true and correct copy of this revised privilege log is being filed under seal, and is attached hereto as Exhibit A.

DISCUSSION

I. Sanctions Are Not Warranted.

ORS's request for sanctions lacks a legal basis, and it relies on an inaccurate description of the relevant background. Under South Carolina Rule of Civil Procedure 37(b)(2), this Commission has discretion to award sanctions only when a party fails to comply with a discovery order. That has not occurred. The order upon which ORS relies did not limit, and expressly recognized, SCE&G's intention to log certain documents responsive to the ORS Bechtel Requests. Thus, there is no order on which ORS can rely to claim that SCE&G was not able to claim privilege with respect to materials responsive to the ORS Bechtel Requests. Under these circumstances, there is no legal basis for an award of sanctions, much less the most egregious sanctions available—essentially a ruling on the merits in its favor. The Parties' apparent disagreement over the scope of SCE&G's waiver of attorney-client privilege has not been resolved by the Commission, and to the extent that ORS wishes to criticize SCE&G for doing precisely what the Hearing Officer contemplated, ORS cannot claim misconduct and certainly is not entitled to an award of sanctions.

A. SCE&G Has Complied with the Hearing Officer's Order to Produce the Bechtel Documents.

Sanctions are not warranted for the simple reason that SCE&G fully complied with the Hearing Officer's June 21, 2018 order. That Order noted that, as stated in the response to the motion to compel, SCE&G had agreed to produce certain documents related to the Bechtel

Report, and thus ordered that SCE&G “shall produce the responsive documents and the previously promised privilege log on or before July 6, 2018.” Order at 2. SCE&G did just that: on July 6, 2018, it made a document production to ORS responsive to the requests related to Bechtel, along with a privilege log.

ORS bases its contention that SCE&G did not comply with the Order on the fact that SCE&G designated documents responsive to the ORS Bechtel Requests as privileged. But that is precisely what SCE&G informed the ORS, and the Hearing Officer, it would do, and it is precisely what the Hearing Officer allowed SCE&G to do. The Order only required SCE&G to produce the documents that SCE&G had stated it would produce in the response to ORS’s motion to compel. And the Order flatly contradicts ORS’s claim that SCE&G cannot designate *any* documents responsive to the ORS Bechtel Requests as privileged: the Hearing Officer ordered only that SCE&G “shall produce the responsive documents *and the previously promised privilege log* on or before July 6, 2018.” Order at 2 (emphasis added). Obviously, if no documents responsive to the ORS Bechtel Requests were privileged, then there would be no need for a privilege log.

B. SCE&G’s Disclosure of Documents Regarding Bechtel’s Engagement and Report Does Not Constitute a Waiver as to the Documents Listed on SCE&G’s Privilege Log.

ORS also claims that no privilege can apply to these documents because SCE&G’s agreement to produce documents responsive to the ORS Bechtel Requests constitutes a waiver of attorney-client privilege as to the documents listed on the privilege log. Note, of course, the absurdity of seeking sanctions based on this contention. It was SCE&G’s agreement to produce certain documents, an agreement that expressly contemplated claiming privilege as to additional documents, that ORS claims SCE&G violated. ORS cannot base a request for sanctions on

failure to comply with an agreement that expressly contemplated the very conduct that ORS challenges.

Nor can ORS claim that SCE&G's production somehow effects a broader waiver of its continuing ability to claim privilege as to other documents. Subject matter waiver "does not open up the possibility of a fishing expedition of all confidential communications" between a client and attorney. *Hawkins v. Stables*, 148 F.3d 379, 384 n.4 (4th Cir. 1998).⁴ Accordingly, "[a] party cannot artificially expand the scope of the subject matter waiver to create a waiver that is broader than that of the disclosure that waives the protection." *E.I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, 269 F.R.D. 600, 607 (E.D. Va. 2010); *see also Ingenito v. Riri USA, Inc.*, No. 11-CV-2569 (MKB) (RLM), 2016 WL 1642643 (E.D.N.Y. Apr. 25, 2016) (voluntary disclosure of attorney-client communication regarding timing of plaintiff's dismissal from job was not subject-matter waiver of all attorney-client communications regarding plaintiff's employment).

As explained above, to correct ORS's misrepresentations regarding the Bechtel Report, SCE&G agreed to produce "documents that provide the full account of the Bechtel engagement and assessment, including the communications related to the engagement of Bechtel and the ensuing Bechtel Report" in response to the ORS Bechtel Requests. As made clear in the response to ORS's motion to compel, SCE&G did not waive privilege with regard to any attorney-client communication that mentioned, involved, or otherwise referenced Bechtel.

⁴ While South Carolina law recognizes that voluntary waiver of an attorney-client communication waives privilege for other communications on the same subject, *see, e.g., Marshall v. Marshall*, 282 S.C. 534, 538-39, 320 S.E.2d 44, 46-47 (S.C. Ct. App. 1984), it does not provide a standard for determining whether particular communications fall within the relevant subject matter. Federal courts have addressed the issue, as discussed above.

SCE&G's production of documents regarding the retention of Bechtel or the creation of the Bechtel Report:

Post-Abandonment Communications. The majority of the logged documents—41 of the 57⁵—are emails or email attachments from August 14, 2017 or later. These communications occurred after SCE&G decided to abandon the Project, and long after SCE&G received the Bechtel Report. As their descriptions make clear, these are communications between SCE&G's internal and external counsel and SCE&G's management concerning how SCE&G would respond to demands to release the Bechtel Report to the South Carolina government in August and September 2017—*i.e.*, after the abandonment petition had been filed.⁶ While these post-abandonment documents discuss “release of the Bechtel report,” they do so in the completely separate and independent context of deciding, during the existence of current proceedings and legislative review, how to deal with demands for release of the report. They do not constitute the “communications related to the engagement of Bechtel and the ensuing Bechtel Report” that SCE&G agreed to produce, and they clearly constitute protected attorney-client communications and opinion work product. They are confidential communications giving or reflecting legal advice, *see State v. Love*, 275 S.C. 55, 271 S.E.2d 110 (S.C. 1980), and/or were prepared in anticipation of litigation arising from the Project, *see Tobaccoville USA, Inc. v. McMaster*, 387 S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (work-product doctrine “protects from discovery documents prepared in anticipation of litigation”).

⁵ On SCE&G's revised privilege log, these are entries 2, 7–10, and 36–71.

⁶ For example, a representative document is entry no. 7, which is an August 18, 2017 email from SCANA's General Counsel to its Chief Financial Officer “providing information to facilitate the rendition of legal advice regarding potential disclosure of a confidential assessment prepared by a third-party consultant for and at the direction of legal counsel in anticipation of litigation with WEC.”

S.C. 287, 294, 692 S.E.2d 526, 530 (2010) (work-product doctrine “protects from discovery documents prepared in anticipation of litigation”).

Documents Responsive to Request 6-6. The remaining sixteen entries consist of documents responsive to Request 6-6, which sought documents from April 1 through November 30, 2015 with either the terms “Kevin Marsh” and “Bechtel” or “Kevin Marsh” and “project manager.” Fourteen of these entries are presentations to and other materials for the SCANA Board of Directors.⁷ These fourteen documents have nothing to do with Bechtel—i.e., the presentations do not contain the word “Bechtel” and do not otherwise address the Bechtel engagement or report—but contain the terms “Kevin Marsh” and “project manager.” Given their lack of any connection to Bechtel and their independently privileged nature,⁸ they clearly fall outside the category of documents SCE&G agreed to produce. Another two entries⁹ are legal invoices from SCE&G and Santee Cooper’s outside legal counsel, George Wenick of Smith, Currie & Hancock, which contain the terms “Kevin Marsh” and “Bechtel.” Neither invoice—both of which SCE&G produced in redacted form—contains any meaningful connection to Bechtel’s engagement or the subsequent creation of the Bechtel Report. They too fall outside of SCE&G’s agreement to produce documents responsive to the ORS Bechtel Requests.

In short, the documents responsive to the ORS Bechtel Requests included on SCE&G’s privilege log are subject to privilege on an independent basis and relate to issues outside of that which SCE&G agreed to produce. Particularly given that the Order explicitly anticipated that some documents responsive to the ORS Bechtel Requests would remain privileged, SCE&G has

⁷ These include entries 72–73, 342–343, 349–350, and 352–359.

⁸ As the privilege log reflects, these board materials are draft documents that were prepared at the direction of counsel.

⁹ Entries 74 and 433.

a good-faith basis to protect its attorney-client communications and assert privilege over this limited number of documents.

C. Even if the Commission Rejects SCE&G's Good-Faith Privilege Assertions, Sanctions are not Warranted.

Even if the Commission were to disagree with SCE&G's privilege determinations as to the independent bases upon which these documents have been withheld, the sanctions requested by ORS are unwarranted. ORS seeks draconian and wildly disproportionate sanctions in the form of outcome-determinative inferences that: (1) SCE&G engaged in a deliberate scheme to conceal information from ORS and the Commission; and (2) all costs incurred after October 22, 2015 cannot be included in the rate base for setting future rates. Mot. at 9–10. As ORS acknowledges, such drastic sanctions are only possibly appropriate where there has been “bad faith, willful disobedience, or gross indifference to the opposing party’s rights.” Mot. at 9 (citing *McNair v. Fairfield Cnty.*, 379 S.C. 462, 466, 665 S.E.2d 830, 832 (S.C. Ct. App. 2008)). But as established above, ORS has not shown anything of the sort. SCE&G has made a good-faith effort to comply with the Hearing Officer’s Order while preserving its attorney-client privilege as the Order explicitly allowed. SCE&G has provided a privilege log that describes each document that has been withheld and the basis for doing so and has de-designated five of the documents originally listed on the privilege log in an effort to address ORS’s complaints.

SCE&G’s reasonable efforts to comply with the Order preclude the sanctions sought by ORS. A discovery sanction “should be reasonable, and the court should not go beyond the necessities of the situation to foreclose a decision on the merits.” *Karppi v. Greenville Terrazzo Co.*, 327 S.C. 538, 543, 489 S.E.2d 679, 682 (S.C. Ct. App. 1997); *see also Balloon Plantation, Inc. v. Head Balloons, Inc.*, 303 S.C. 152, 154, 399 S.E.2d 439, 440 (S.C. Ct. App. 1990) (“In other words, the sanction should be a rifle-shot, not a shotgun blast.”). South Carolina courts

accordingly refuse to grant the type of sanctions sought by ORS absent intentional misconduct or gross indifference. *See Orlando v. Boyd*, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (S.C. 1996); *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 109, 410 S.E.2d 537, 542 (S.C. 1991); *Kershaw Cnty. Bd. of Educ. v. U.S. Gypsum Co.*, 302 S.C. 390, 395, 396 S.E.2d 369, 372 (S.C. 1990); *Rickerson v. Karl*, 412 S.C. 215, 222, 770 S.E.2d 767, 771 (S.C. Ct. App. 2015). Even were the Commission to agree with ORS's position regarding the documents as to which SCE&G is claiming privilege, that would not be a basis for granting ORS what would effectively amount to a default ruling on the merits.

ORS's requested sanctions are even more inappropriate given that the record flatly contradicts one of ORS's requested inferences: that SCE&G engaged in a deliberate scheme to conceal information from ORS and the Commission with respect to the Bechtel documents and Bechtel Report. As evidence from the ongoing ratepayer litigation against SCE&G (in which ORS is a party and from which ORS attaches a motion to compel) demonstrates, ORS was well aware of Bechtel's involvement with the Project and the Bechtel Report. *See* Ex. B (Dep. of Margaret Felkel) at 137:9-140:24. This evidence flatly contradicts the narrative that ORS has repeatedly offered, both here and in public statements, that it was unaware of Bechtel and the Bechtel Report.

ORS's arguments for sanctions based on supposed delay by SCE&G are also misguided. SCE&G complied with the Order by providing ORS documents responsive to the ORS Bechtel Requests and a privilege log by July 6, 2018. SCE&G did this while managing continuing discovery requests from ORS, which now exceed an astounding 480. SCE&G has to date produced over 2.5 million documents to ORS. Moreover, SCE&G has since served a revised privilege log and produced additional documents from its initial log that it reassessed and

determined not to be privileged. SCE&G's good-faith review of its productions to ensure it has produced all responsive non-privileged documents should not be a basis for sanctions.

II. SCE&G Has Properly Withheld and Logged Documents Responsive to Request 5-26 on the Basis of Attorney-Client Privilege and Work Product Protection.

ORS's motion to compel the production of privileged documents responsive to Request 5-26 also lacks support. As noted above, Request 5-26 seeks documents prepared by SCE&G employees at the direction of outside regulatory counsel to assist with legal advice in connection with potential regulatory proceedings following Westinghouse's bankruptcy in 2017. SCE&G has entered on its privilege log specific documents responsive to Request 5-26 that fall within well-accepted definitions of attorney-client privilege and work product. ORS's argument to the contrary consists of speculation about the documents' contents and the incorrect legal position that any document that serves a business purposes cannot also be privileged or work product.

SCE&G, however, also is cognizant of ORS's need for prompt access to documents relevant to the pending abandonment petition and has no interest in diverting Commission attention to unnecessary discovery fights. Accordingly, SCE&G has continued to review the documents listed on the privilege log and has concluded that some of the documents on the log can be produced as non-privileged. SCE&G will produce those specific de-designated documents and a related privilege log for documents remaining on the log, which at a minimum will narrow the remaining issues relating to Request 5-26.

In light of the serious accusations made by ORS in its motion regarding SCE&G's production of documents, SCE&G notes the following regarding the documents previously listed on the privilege log responsive to Request 5-26 as well as the documents which will remain on the revised log as to that request.

A. The Withheld Documents Are Subject to Attorney-Client Privilege.

Request 5-26 seeks analyses and case studies prepared by SCANA/SCE&G employees at the direction of outside counsel. This places them within well-accepted parameters of attorney-client privilege. As multiple courts have recognized, privilege attaches to employees who conduct investigations at the direction of counsel and to assist counsel with providing legal advice. See *Carter v. Cornell Univ.*, 173 F.R.D. 92, 94 (S.D.N.Y. 1997) (privilege applied to interviews between university employees and dean, when dean conducted interviews at request of lawyers defending university); *Welland v. Trainer*, No. 00 Civ. 0738(JSM), 2001 WL 1154666, at *3 (S.D.N.Y. 2001) (client's employee was agent of attorney serving as investigator) *aff'd* 116 F. App'x 321 (2d Cir. 2004); *Proa v. NRT Mid-Atl., Inc.*, No. CV AMD-05-2157, 2008 WL 11363286, at *6 (D. Md. June 20, 2008) (same).

Here, SCE&G was engaged in a process, directed by counsel, to evaluate its options under existing law related to the Project. SCE&G requested that its outside regulatory counsel, Belton T. Ziegler of Womble Bond Dickinson, render legal advice in connection with the bankruptcy and its implications for whether SCE&G should continue the Project. To assist with this advice, Mr. Ziegler directed SCANA/SCE&G employees to conduct the analyses and studies described in Request 5-26. Put differently, SCANA/SCE&G employees conducted an investigation, at the direction of counsel, to analyze different possible scenarios under which SCE&G might abandon or continue the Project, to assist counsel in advising SCE&G in light of the regulatory issues created by Westinghouse's bankruptcy. This activity falls squarely within cases that have found employees conducting investigations for a company's attorneys serve as agents of the attorney for attorney-client privilege purposes. See *supra* at 16.

For similar reasons, it is irrelevant that some of the entries on SCE&G's privilege log do not list an attorney as a sender or receiver. Communications need not involve an attorney to be

privileged, so long as the communication reflects or concerns legal advice sought or received. *See, e.g., In re Abilify (Aripiprazole) Prods. Liab. Litig.*, Case No. 3:16-md-2734, 2017 WL 6757558, at *5 (N.D. Fla. Dec. 29, 2017) (“Management level employees within complex organizations . . . are permitted to discuss legal advice sought and given without losing the privilege . . . This is so even where the attorney is not identified as an author or addressee of a communication.”); *Sky Angel US, LLC v. Discovery Commc’ns, LLC*, 28 F. Supp. 3d 465, 487 (D. Md. 2014) (“[I]ntracorporate communications concerning information requested by a lawyer for the purposes of rendering legal advice can be protected by the attorney-client privilege.”); *Santrader, Ltd. v. Gen. Elec. Co.*, 150 F.R.D. 539, 545 (E.D.N.C. 1993) (“A document need not be authored or addressed to an attorney in order to be properly withheld on attorney-client privilege grounds . . . [I]n instances where the client is a corporation, documents subject to the privilege may be transmitted between non-attorneys to relay information requested by attorneys.”).

The fact that these studies may also have served a business purpose does not eliminate attorney-client privilege. Contrary to ORS’s suggestion, a communication may serve both a legal and business purpose and still be privileged, so long as the communication is “for the purpose of obtaining legal assistance and not *predominately* for another purpose.” Restatement (Third) of the Law Governing Lawyers § 72 cmt. c (2000) (emphasis added). There is no requirement that obtaining or providing legal advice be the sole, or even “but for,” purpose of a communication. *See In re Gen. Motors Ignition Switch Litig.*, 80 F. Supp. 3d 521, 530 (S.D.N.Y. 2015); *see also In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758–59 (D.C. Cir. 2014) (“So long as obtaining or providing legal advice was one of the significant purposes of the internal investigation, the attorney privilege applies, even if there were also other purposes for the

investigation and even if the investigation was mandated by regulation rather than simply an exercise of company discretion.”).

ORS’s contention that these documents “bear no relationship to the provision of legal advice by an attorney,” Mot. at 13, meanwhile, is nothing more than speculation about the documents’ contents. And ORS’s assertion that SCE&G’s privilege log does not show that the communications contain or reflect legal advice is likewise baseless. South Carolina Rule of Civil Procedure 26(b)(5) provides that a party withholding information on the grounds of privilege must “describe the nature of the documents . . . in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.” Rule 26(b)(5)(A), SCRPC. SCE&G has produced a detailed privilege log identifying the date of the document, the author, recipient and copied parties, the type of document, as well as a description of the document setting forth the basis for why each document is protected by attorney-client privilege or work product doctrine. This satisfies SCE&G’s burden under South Carolina law.

B. The Withheld Documents Are Work Product.

Many of the withheld documents are also protected work product. “The attorney work product doctrine protects from discovery documents prepared in anticipation of litigation, unless a substantial need can be shown by the requesting party.” *See Tobaccoville USA, Inc.*, 387 S.C. at 294, 692 S.E.2d at 530. Work product need not be created by an attorney to be protected. *See* Rule 26(b)(3), SCRPC.

BLRA proceedings before the Commission qualify as “litigation” for purposes of work product protection. PSC proceedings are conducted pursuant to Commission Regulations and the South Carolina Rules of Civil Procedure. *See* S.C. Code Ann. Regs. 103-833 through 103-835. South Carolina Rules of Evidence govern the ultimate hearing. *Id.* 103-846(A). As other

courts have recognized, such proceedings are adversarial in nature and qualify as “litigation.” *See, e.g., Niagara Mohawk Power Corp. v. Stone & Webster Eng’g Corp.*, 125 F.R.D. 578, 591 (N.D.N.Y. 1989); *S. Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377, 1384-85 (Fla. 1994).

These documents were prepared in anticipation of litigation. While South Carolina asks whether documents were prepared “because of” litigation to determine work product protection, this test does not mean, as ORS argues, that any document that serves both a business and legal purpose cannot qualify for work product protection. Indeed, as a leading federal case on the “because of” standard (and one cited by the South Carolina Supreme Court in *Tobaccoville*) explained, “[t]he ‘because of standard’ does not consider whether litigation was a primary or secondary motive behind the creation of a document,” but rather asks whether the totality of the circumstances suggest the document “was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation.” *In re Grand Jury Subpoena (Mark Torj/Torff Envtl. Mgmt.)*, 357 F.3d 900, 908 (9th Cir. 2004) (quoting *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998)); *see id.* (holding that work product protection applies to documents prepared “at least in part” to assist counsel prepare for anticipated litigation).

The documents responsive to Request 5-26 satisfy this “because of” test. Westinghouse’s bankruptcy had obvious regulatory and litigation implications. SCE&G had engaged outside counsel to assist with those potential proceedings. That counsel, in turn, worked with SCE&G employees to analyze possible scenarios under which the Project might be continued or abandoned—situations with clear implications for any proceedings before the PSC (which, as explained above, count as “litigation” for purposes of the work product analysis). Contrary to ORS’s contention, these documents were not merely created in the ordinary course of business.

And it is apparent that these documents were prepared, “at least in part,” to assist SCE&G’s regulatory counsel in advising SCE&G and preparing for litigation, meaning that they are protected by the work product doctrine.

C. SCE&G Has Not Waived Attorney-Client Privilege or Work Product Protection Through Prior Disclosures.

Finally, ORS makes a series of arguments that SCE&G has somehow waived attorney-client privilege or work product protection through alleged prior disclosures of documents responsive to Request 5-26. None of these arguments has merit.

1. Disclosure of Non-Privileged Documents to Norm Richardson.

First, ORS makes the remarkable argument that because SCE&G produced *non-privileged* documents responsive to Request 5-26 to ORS consultant Norm Richardson, SCE&G has now waived attorney-client privilege over all documents responsive to Request 5-26. *See* Mot. at 18. As SCE&G explained to ORS in a July 31, 2018 letter, Mr. Richardson was given access to two folders of material related to the abandonment study, neither of which contained privileged information. *See* Mot., Ex. F (July 31, 2018 Letter to Matthew T. Richardson). Of course, production of non-privileged information is not a waiver of attorney-client privilege. And the fact that SCE&G provided “only” non-privileged documents to Mr. Richardson, an opposing consulting expert, is not surprising, as ORS suggests, but rather common sense.

2. Reference to the Abandonment Decision in SCE&G’s Preliminary Injunction Briefing.

Second, ORS contends that SCE&G waived attorney-client privilege over the Request 5-26 documents by referencing the findings of those studies in a complaint filed in federal court. *See* Mot. at 19–20. As an initial matter, while ORS claims the complaint “referred specifically to the very same case studies and analysis sought in Request 5-26,” Mot. at 20, it ignores that SCE&G has claimed privilege with respect to only *some* of the documents responsive to Request

5-26, and has produced others. ORS offers no support for its suggestion that the quoted portion of the complaint relies on privileged materials.

Moreover, even if the complaint did reference privileged materials, its general reference to SCE&G's investigation is not a waiver of attorney-client privilege. The excerpt that ORS quotes simply notes that SCE&G conducted an assessment of Westinghouse's data following Westinghouse's bankruptcy and reached certain conclusions about the likely timetable and costs for completing the Project. Other courts have held that such "opaque" references to attorney involvement that do not "reveal the substance of the underlying communications or analysis" do not constitute waiver. *Robinson v. Morgan Stanley*, No. 06 C 5158, 2010 WL 1050288, at *4 (N.D. Ill. Mar. 17, 2010); *see also In re Veeco Instruments, Inc. Sec. Litig.*, No. 05 MD 1695(CM(GAY), 2007 WL 210110, at *2 (S.D.N.Y. 2007) (no waiver where disclosures merely summarized findings and conclusions of internal investigation and did not quote, paraphrase, or reference any of the specific documents at issue). Indeed, under ORS's reasoning, merely describing the nature of the withheld documents on a privilege log (as required by the rules) would amount to waiver.

3. Allegations in a Separate Motion to Compel in Ratepayer Litigation.

Third, ORS points to a motion to compel filed against SCE&G in a different litigation, *Lightsey et al. v. SCE&G et al.*, No. 2017-CP-24-335, which identified a select number of documents produced by SCE&G that contained inconsistent redactions. None of those documents is responsive to Request 5-26 or otherwise at issue here. That does not stop ORS, however, from asserting, without basis, that these inconsistencies are "suggestive of what is likely occurring" with SCE&G's privilege log in this matter. Mot. at 21.

The Commission should reject ORS's rank speculation on this point. Plaintiffs in the *Lightsey* matter identified fifteen documents (out of roughly 700 redacted documents) produced by SCE&G that had redactions inconsistent with other versions of the same documents. As SCE&G explained in its response, those inconsistencies were the result of over a dozen attorneys reviewing a voluminous number of potentially responsive documents in a compressed two-week time frame, and the inconsistencies were promptly resolved within days of them being identified. SCE&G disagrees with ORS's assertion that "every instance" of an inconsistent redaction revealed that SCE&G's privilege claim was erroneous.

To the extent that ORS notes the *Lightsey* motion to compel simply to ask that SCE&G be held "to the burden of demonstrating that privilege applies," *id.*, SCE&G has met that burden with respect to both the Bechtel documents and the documents responsive to Request 5-26.

D. *In Camera* Review Is Unnecessary and Inappropriate.

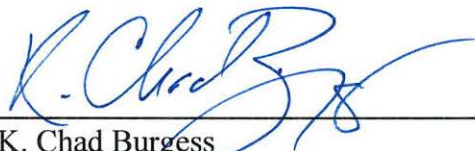
Finally, it is inappropriate for ORS to ask the Commission to review every document on SCE&G's privilege log *in camera*. While such relief may be appropriate under certain circumstances for specific documents, ORS offers no authority for having the Commission review the documents at issue here. See *Smith v. Shelter Mut. Ins. Co.*, C.A. No. 15-357-SDD-RLB, 2018 WL 1278429, at *2 (M.D. La. Mar. 12, 2018) (denying "motion to the extent it seeks a blanket *in camera* review of the withheld documents" because it would "constitute a great and unnecessary expenditure of judicial resources"); *United States v. Homeward Residential, Inc.*, Case No. 4:12-CV-461, 2016 WL 1031154, at *4 (E.D. Tex. Mar. 15, 2016) (refusing to conduct *in camera* review where there were "potentially hundreds of communications that would require review" because such a review "would constitute a great and unnecessary expenditure of judicial resource"); *United Inv. Life Ins. Co. v. Nationwide Life Ins. Co.*, 233 F.R.D. 483, 486 (N.D. Miss. 2006) (same).

As one district court recognized, a “blanket request for review of the entire privilege log suggests a ‘fishing expedition,’ as opposed to a specific request to discover relevant information.” *Armouth Int’l, Inc. v. Dollar Gen. Corp.*, No. 3:14-0567, 2015 WL 6696367, at *6 (M.D. Tenn. Nov. 2, 2015). “Engaging in such a procedure ‘would constitute ... an expenditure of judicial resources that could be justified only by an implicit determination that the representations made by defense counsel are untrue.” *Id.* (quoting *Guy v. United Healthcare Corp.*, 154 F.R.D. 172, 176 (S.D. Ohio 1993)). Furthermore, “granting [the] motion . . . would open the floodgates and allow any party to demand an *in camera* review of the opposing party’s attorney-client communications so long as the former expressed an unfounded suspicion that counsel for the latter had misrepresented the basis for the privilege claim.” *Id.*

CONCLUSION

ORS has leveled baseless charges against SCE&G and seeks drastic relief based on those charges. SCE&G produced exactly what it was ordered to produce in response to the ORS Bechtel Requests. The documents remaining on the privilege log relating to those requests are privileged on an independent basis and are outside the scope of what SCE&G agreed to produce. There are no valid grounds for the drastic sanctions that ORS demands over what, at best for ORS, is a good faith disagreement about the scope of the attorney-client privilege and work product protections. Similarly, SCE&G’s privilege claims regarding documents responsive to Request No. 5-26 are well-founded, and ORS’s request to compel production of those documents should be denied.

Respectfully submitted,



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Date: August 14, 2018

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**IN RE: Friends of the Earth and Sierra Club,)
Complainant/Petitioner vs. South Carolina)
Electric & Gas Company,)
Defendant/Respondent)**

IN RE: Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920

IN RE: Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans

Consistent with the confidentiality procedures set forth in S.C. Code Ann. § 58-4-55 (2015, as amended), Commission Order No. 2005-226, and pursuant to Rule 41.11(b), SCRCF, South Carolina Electric & Gas Company ("SCE&G") respectfully moves for leave to file under seal two documents in connection with its Response to the Motion filed by the South Carolina Office of Regulatory Staff ("ORS") to Sanction Joint Applicants and to Compel Production of Wrongfully Withheld Documents in Joint Applicants' Privilege Log. The first document in question is a revised privilege log submitted by SCE&G to ORS on August 10, 2018. This log is a revised

version of a previous log that SCE&G submitted to ORS on July 6, 2018. In connection with its motion for sanctions, ORS previously moved for leave to file the July 6, 2018 log under seal, which the Hearing Officer granted. *See* Order No. 2018-106-H (Aug. 9, 2018).

The second document is an excerpt from the deposition of Margaret Felkel in the matter *Lightsey v. SCE&G*, Case No. 2017-CP-25-335, currently pending in the Court of Common Pleas of Hampton County. The transcript of that deposition was designated confidential pursuant to the agreements of the parties in the *Lightsey* matter.

Like ORS's motion to file the July 6, 2018 privilege log under seal, this motion and the subject documents meet the factors for sealing documents set out in Rule 41.11(b), SCRPC. Specifically:

1. Public notice of the request to seal and opportunity to object is provided by this publicly filed motion and its description of the documents sought to be filed under seal.
2. As with the July 6, 2018 privilege log, both the entire August 10, 2018 privilege log and excerpted portion of Ms. Felkel's deposition transcript are confidential, making redaction not practical and filing under seal appropriate.
3. The documents contain sensitive and confidential information protected from public disclosure, as SCE&G indicated by designating the August 10, 2018 privilege log as "confidential" pursuant to S.C. Code Ann. § 58-4-55, and by similarly designating the Felkel deposition transcript confidential pursuant to the agreements of the parties in the *Lightsey* matter.

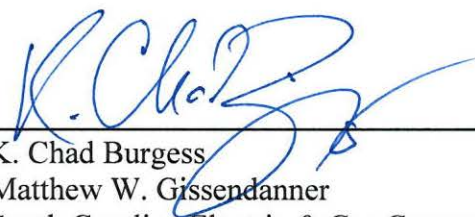
Given that ORS has attached SCE&G's July 6, 2018 privilege log as an exhibit to its motion for sanctions, SCE&G respectfully believes it is critical that the Hearing Officer also have an opportunity to review its revised, August 10, 2018 privilege log. SCE&G similarly believes that it is critical for the Hearing Officer to have an opportunity to review Ms. Felkel's testimony, given

that Ms. Felkel testified regarding ORS's knowledge of Bechtel Corporation, which contradicts the inference sought by ORS in its pending motion that SCE&G deliberately concealed information about Bechtel Corporation from ORS.

For these reasons, SCE&G respectfully requests that the Commission grant this motion and permit SCE&G to file the August 10, 2018 privilege log and an excerpt from the Margaret Felkel deposition transcript under seal for the Commission's *in camera* review. SCE&G will provide both documents under separate cover to the Commission if the Commission so directs.

[SIGNATURE PAGE FOLLOWS]

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Cayce, South Carolina
August 14, 2018

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 2017-370-E

IN RE: Joint Application and Petition of South
Carolina Electric & Gas Company and
Dominion Energy, Incorporated for
Review and Approval of a Proposed
Business Combination between SCANA
Corporation and Dominion Energy,
Incorporated, as May Be Required, and
for a Prudency Determination
Regarding the Abandonment of the V.C.
Summer Units 2 & 3 Project
and Associated Customer Benefits and
Cost Recovery Plans

**CERTIFICATE OF
SERVICE**

This is to certify that I caused to be served one (1) copy of **South Carolina Electric & Gas Company's Response to Motion to Sanction Joint Applicants and to Compel Production of Wrongfully Withheld Documents in Joint Applicants' Privilege Log and Motion for Leave to File Documents Under Seal to the persons named below via electronic mail only at the addresses set forth:**

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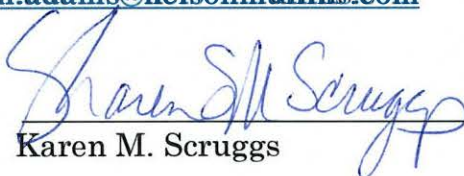
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